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In The
Supreme Court of the United States
October Term, 1970

No. 1019

RALPH PRINTING & LITHOGRAPHING COMPANY,
Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

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October Term, 1970

No. ——

RALPH PRINTING & LITHOGRAPHING COMPANY,
PETITIONER,

V.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Ralph Printing & Lithographing Co. prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit, entered in Case No. 18570 on September 25, 1970. A Petition for Rehearing was denied on October 28, 1970 and the decree and judgment of the Circuit Court was also entered on October 29, 1970. In addition, a Motion to Stay the Mandate in the instant case pending application to this Court for a Writ of Certiorari was denied on November 6, 1970.

OPINIONS BELOW

The original decision of the Court of Appeals enforcing a bargaining order of the National Labor Rela-

tions Board is reported at 378 F.2d 687 (8th Cir. 1967). The opinion of the Special Master is not officially reported but is set out in Appendix B to this petition at page 25. The 1970 opinion of the Court of Appeals is not yet officially reported, but is unofficially reported at 75 L.R.R.M. 2267 (8th Cir. 1970), and is set out in Appendix A to this petition at page 15.

JURISDICTION

Jurisdiction to review by Writ of Certiorari the judgment and decision of the United States Court of Appeals for the Eighth Circuit, entered on September 25, 1970, is invoked under the provisions of 28 U.S.C. § 1254 (1) (1968).

QUESTION PRESENTED

The question presented is whether, under the National Labor Relations Act, the National Labor Relations Board or any Court has the power to order a party to agree to substantive provisions of a collective bargaining agreement and to concede and withdraw various proposals upon which no agreement had been reached.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act involved in the instant case is Section 8(d) of the Act, which reads:

> For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract

incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . . See 29 U.S.C. § 158 (d) (1965).

STATEMENT OF THE CASE

The order and decision of the United States Court of Appeals for the Eighth Circuit which is the basis of this petition seeking review by this Court, required the petitioner to take the following affirmative action:

> Notifying Lithographers and Photo Engravers International Union, AFL-CIO and its Local 263, Lithographers and Photo Engravers International Union, AFL-CIO (hereinafter collectively called the Union) within 15 days from the entry hereof in writing that upon request of said Union it will execute the agreement concluded in April, 1965 with Local 263.
>
> If so requested by said Union, executing said agreement and delivering the executed copy to the Union within five days of the receipt of said request, and thereafter honoring it in good faith.[1]

The Ralph Printing & Lithographing Co. (hereinafter referred to as the Petitioner or the Company) contends that the National Labor Relations Act does not give the lower court or the National Labor Relations Board (hereinafter referred to as the Board) the power to compel the company to take this action.

This case initially arose following an election in January, 1965, in which 13 employees voted against representation by Local No. 263 of the Lithographers and Photo Engravers International Union, AFL-CIO (hereinafter referred to as the Union) and 12 employees voted for the

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[1] See Appendix A to this petition at pages 22-23.

Union. (R.1)[2] The Union subsequently filed objections to the election and unfair labor practices against the Petitioner. A Trial Examiner found the Respondent guilty of the alleged unfair labor practices and thereafter the Board affirmed the Trial Examiner's Recommended Order (R.2).[3] The Board then petitioned the lower court for enforcement of this order, and enforcement was granted, as modified. *See N.L.R.B.* v. *Ralph Printing & Lithographing Co.*, 379 F.2d 687, 692 (8th Cir. 1967).

On October 3, 1967, bargaining commenced and bargaining continued into April, 1968 (T.29-30, 339, 54-57, 47-49).[4] At the time the parties met for collective bargaining on April 2, 1968, the Union negotiator testified that no agreement had been reached on the following six issues:

1. MINIMUM SCALES - Article III of the contract referred to an attachment which was to be incorporated within and become a part of the terms of the contract (T.78-79). This provision appeared in the April 2nd draft as it had in prior drafts but it is undisputed that there was no attachment appended to the April 2nd draft (T.79). When asked about this omission, the union negotiator explained that "I thought possibly somewhere there would be a list given us or something." (T.79). Practicality dictates that there simply cannot be a contract without this attachment because there would be no adequate way to administer the contract.

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[2] References designated "R" refer to the joint record initially filed with the Court of Appeals in 1967, and which is a part of the Certified Record in this case.

[3] The Board's Decision and Order are reported at 158 N.L.R.B. 1353.

[4] References designated "T" refer to the transcript of proceedings relating to the conference and hearing held on this matter in October and November, 1968, before the Hon. Robert Van Pelt, sitting as special master for the lower Court and which is a part of the Certified Record in this case.

2. MANAGEMENT OF THE PLANT - Article XXXVII was a clause which the union negotiator recognized as being a company proposal that the Company neither bargained away nor dropped its request upon (T.95). The union negotiator also testified that the union considered this clause unnecessary and that it never changed its position in that regard (T.95).

3. HEALTH & WELFARE - Article XXXVIII was a clause which the union negotiator recognized as being a Company proposal that was in dispute that the Company had neither bargained away nor changed its position upon (T. 95).

4. WORK REQUIREMENTS - Article XXXVIV, a clause which the Company indicated as not being agreed upon (T.381), was a clause that the union negotiator recognized as being a Company proposal that the Company had neither bargained away nor changed its position upon (T.96).

5. TIME CLOCK - Article XLI, a clause which the Company designated as being in dispute on April 2nd (T.381), was a clause which the union negotiator recognized as being a Company requested clause (T.96), and about which the union negotiator stated "I don't think we specifically agreed . . . ." (T.96).

6. CLOTHES CHANGING - WASHING - Article XLII was an article that the union negotiator acknowledged as being in dispute, and when asked whether or not the parties ever came to an agreement upon the clause the Union negotiator replied "I don't believe we ever did to my knowledge." (T.98).

The company negotiator also specified two additional company proposals that were still in dispute on April 2,

1968 (T.380-81).[5] The Union negotiator admitted that these clauses were requested by the company (T.78, 92), but he thought that they had been bargained away because they did not appear in the draft of agreed upon proposals prepared for the April 2 meeting (T.78, 92). However, the Union negotiator testified that he did not recall when, if ever, the company agreed to drop its request for these clauses, and when asked if there was anything else to indicate to him that company might have dropped its request for these clauses other that the fact that they were not contained within the April 2 draft, he replied "no" (T.78, 92).

When questioned about six additional clauses, the Union negotiator was unable to specify when, if ever, the parties had reached agreement.[6] The company negotiator further specified two company proposals dealing with picketing and law suits as being in dispute on April 2, 1968 (T.379-80).

At the April 2, 1968 meeting, the Union negotiator signed the draft of agreed upon contract clauses but the company negotiator did not sign that document (T.64). On April 12, 1968, the Union negotiator met with the company president and discussed the April 2 draft as well as the additional items of night premium pay, holiday pay, and job classification (T.131, 226-27). The Union negotiator requested the company president to discuss the April 2 draft with the owner of the company

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[5] NEW MACHINES AND PROCESSES—ARTICLE XXXV and REPRESENTATION—ARTICLE I, SUBSECTION B.

[6] The clauses were: 1) CLOSING UNPROFITABLE DEPARTMENT—ARTICLE XXXIV (T.91), a clause which the Company designated as still being in dispute (T.379); 2) TERM OF BENEFITS—ARTICLE XLIII (T.98-99), another clause which the Company designated as still being in dispute (T.379); 3) STRIKES AND LOCKOUTS—ARTICLE XXXVI (T.93-94); 4) OVERTIME—ARTICLE XI (T.92); 5) SENIORITY—ARTICLE XVII (T.94-95); and 6) BONUS—PIECE WORK (T.105-109).

and urged him to agree upon that draft as a collective bargaining agreement (T.69-283). At that meeting, the company president expressed his dissatisfaction with the health and welfare clause contained in the April 2 draft (T.228).

On April 15, 1968, the president and the owner of the company met with the company negotiator and informed the company negotiator that they could not accept the health and welfare clause contained in the April 2 draft (T.315, 326-29). The company negotiator then sent the Union a letter on April 16, 1968, stating that the company would agree to the Union's job classification demand and grant a 10% night premium in exchange for a reduction of the health and welfare contribution from 100% to 50%. The Union never responded to this proposal.

On July 16, 1968, the Board filed a Petition for Adjudication in Civil Contempt with the lower Court, alleging that the company had bargained in bad faith. On September 17, 1968, the lower Court appointed a Special Master to take testimony and hear evidence on this matter. A conference was held before the Special Master on October 10, 1968, and a hearing was held on November 18, 19, and 22, 1968. On October 2, 1969, the Special Master issued his Report which recommended that the Respondent be adjudicated in civil contempt. On September 25, 1970, the lower Court issued its opinion which accepted this recommendation of the Special Master. A Petition for Rehearing was denied on October 29, 1970, and on November 6, 1970, the lower Court declined to Stay the Mandate in this case pending application to this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below is in direct conflict with the decision of this Court in H. K. Porter Co., Inc. v. N.L.R.B., 397 U.S. 99 (1970).

At the outset it must be emphasized that the question of whether or not a company may be forced to sign a collective bargaining agreement and thereby make the concession of abandoning several of its contract proposals which have not been discussed or agreed upon is not the only issue in this case. However, it is the most basic underlying issue in this entire case, and it has a direct bearing upon the most important aftereffect from this case to the company—the remedial order. The Petitioner submits that the Board has attempted to "float" this issue past judicial scrutiny by placing an extreme amount of emphasis upon the two other main issues in this case—bad faith bargaining and unilateral wage increases.

The Petitioner does not concede its legal position on either of these other two issues, but, as noted before the lower Court, regardless of the decision on either of these other two issues, the Petitioner submits that the remedy in this case must remain the same for one basic reason. Since the record in the instant case clearly shows that no agreement had been reached upon a number of company contract proposals, the Petitioner contends that the company may not be forced to execute a collective bargaining agreement and thus grant the concession of abandoning these contract proposals upon which there is an acknowledged lack of agreement. The Petitioner contends that the decisions of this Court clearly indicate that no party to a proceeding under the National Labor

Relations Act may be forced to reach agreements or grant a concession, and that the decision of the lower Court is in direct conflict with these decisions.

Early in the administration of the National Labor Relations Act, Mr. Chief Justice Hughes noted that: "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever." *See N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Several years later, Mr. Justice Stone, in speaking for this Court, also noted that the National Labor Relations Act "while requiring the employer to bargain collectively, does not compel him to enter into an agreement." *See H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 525 (1941).

Of course, Section 8(d) of the National Labor Relations Act specifically states that the obligation to bargain collectively "does not compel either party to agree to a proposal, or require the making of a concession . . . ." *See* 29 U.S.C. § 158(d) (1965). Subsequent to the enactment of this section of the Act, Mr. Chief Justice Vinson, in speaking for this Court in *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395 (1952) considered this section of the Act and noted that: "And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *Id.* at 404. For many of the policy reasons underlying this congressional enactment and the foregoing cases, this Court granted certiorari last year in the case of *H. K. Porter Co., Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

In issuing the Court's decision in that case, and in speaking directly to the issue that is presented by the instant case, Mr. Justice Black stated:

> The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. *See* 90 S. Ct. at 826.

Accordingly, the holding in the *H. K. Porter* case was that, while the Board does have power to require employers and employees to negotiate, "it is without power to compel a company or a Union to agree to any substantive contractual provision of a collective bargaining agreement." *See* 90 S. Ct. 823.

The Petitioner submits that the decision by the lower Court in this case is in direct conflict with the decision and holding of this Court in the *H. K. Porter* case, and the other cases noted. The Petitoner bases this contention on the fact that "the general understanding in collective bargaining is that agreement on any particular point is tentative until there is agreement upon all the issues." *See* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1410 n. 36 (1958). Thus, since the record indicates that a number of company contract proposals had not been agreed upon and had not been bargained away, the Petitioner submits that the draft of agreed upon articles that was prepared for the April 2, 1968, meeting is not a complete collective bargaining agreement. A number of the articles in this draft could have been significantly changed, modified or bargained away in reaching agreement on the company contract proposals. Indeed, it is possible that no agreement

would have been reached upon the company contract proposals and that none of the articles in the April 2, 1968, draft would have then been agreed upon by the parties.

However, in total disregard of the fact that this issue was seemingly settled by this Court last year in the *H. K. Porter* case, the lower Court has ordered the Petitioner to execute the draft of the agreed upon articles which was prepared for the April 2, 1968 meeting. Thus, the company contract proposals which were not agreed upon as of April 2, 1968 have been effectively withdrawn from the consideration of the parties by the lower Court and are rendered as meaningless for collective bargaining purposes as if they were never proposed by the company in the first place. The Petitioner submits that the conflict between this decision of the lower Court and the decision of this Court in the *H. K. Porter* case is agonizingly obvious.

The action of the lower Court in effectively foreclosing further consideration of the company proposals which even the Union negotiator acknowledged had not been agreed upon or bargained away constitutes an obvious concession on the part of the Petitioner which has been forced upon it by the lower Court. Similarly, the decision of the lower Court presumes that the parties would have bargained away the remaining company contract proposals without affecting the articles contained in the April 2, 1968 draft.

The Petitioner submits that this type of judicial speculation is beyond the limits of the National Labor Relations Act and in clear conflict with this Court's decision in the *H. K. Porter* case. Moreover, the record clearly indicates that the Petitioner did not agree with at least the health and welfare article in the April 2, 1968 draft.

However, the decision of the lower Court has effectively removed this decision from the hands of the Petitioner and forces the Petitioner, against its will, to execute and abide by this article and the other articles in the April 2, 1968 draft. For these reasons, the Petitioner respectfully urges this Court to grant the Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit so that its decision in Case No. 18570 may be reviewed by this Court.

II.

The decision of the lower Court is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in Tex Tan Welhausen Co. v. N.L.R.B., — F.2d —, 75 L.R.R.M. 2554 (5th Cir. 1970).

After this Court issued its decision in *H. K. Porter Co., Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970), it also remanded another case involving the same issue to the United States Court of Appeals for the Fifth Circuit for Reconsideration in light of the *H. K. Porter* case. *See Tex Tan Welhausen Co.* v. *N.L.R.B.*, 90 S. Ct. 1516 (1970). Upon remand, the United States Court of Appeals for the Fifth Circuit reconsidered its prior decision in light of the *H. K. Porter* case and modified its decision to specifically deny enforcement to provisions of the Board's Recommended Order which would require the company to cease and desist from insisting upon a contract clause depriving employees of their right to file grievances on the establishment of standards for piece work, insisting upon a contract provision excluding any definition of productivity speed ratings and insisting upon being given the right to fix rates of pay of its piece work employees unilaterally. *See Tex Tan Welhausen*

Co. v. *N.L.R.B.*, — F.2d —, 75 L.R.R.M. 2554 (5th Cir. 1970).

The Petitioner submits that the decision of the lower Court in this case is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in the *Tex Tan* case. In effect, the Circuit Court in the *Tex Tan* case required the company to withdraw certain of its contract proposals, just as the lower Court did in the instant case. However, the Circuit Court in the *Tex Tan* case reconsidered its decision in light of the *H. K. Porter* case and reversed itself upon this issue. Unfortunately, the lower Court in the instant case declined to reconsider its decision on this issue and thus presents a situation wherein two different Circuit Courts have reached two different conclusions on the same issue since the issuance of this Court's decision in the *H. K. Porter* case.

In addition, the decision of the lower Court in the instant case is also in conflict with the decisions of other various Circuit Courts issued prior to the decision by this Court in the *H. K. Porter* case to the effect that a party may not be forced to agree to the terms of a collective bargaining agreement or be forced to make a concession. *See e.g.*, *N.L.R.B.* v. *H. E. Fletcher Co.*, 298 F.2d 594, 602 (1st Cir. 1962); *N.L.R.B.* v. *Coletti Color Prints, Inc.*, 387 F.2d 298, 304 (2nd Cir. 1967); *Radiator Specialty Co.* v. *N.L.R.B.*, 336 F.2d 495 (4th Cir. 1964); *N.L.R.B.* v. *American Agreggate Co., Inc.*, 335 F.2d 253, 255 (5th Cir. 1964); *N.L.R.B.* v. *United Clay Mines Corp.*, 219 F.2d 120 (6th Cir. 1955); *N.L.R.B.* v. *Lewin-Mathes Co.*, 285 F.2d 329 (7th Cir. 1960); *N.L.R.B.* v. *Biles-Colman Lumber Co.*, 98 F.2d 18, 22 (9th Cir. 1938); *Local No. 1175* v. *N.L.R.B.*, 419 F.2d 726, 731 (D.C. Cir. 1969).

In fact, the decision of the lower Court is even in conflict with one of its own previous decisions. *See Wilson & Co.* v. *N.L.R.B.*, 115 F.2d 739 (8th Cir. 1940). In addition to the decision of the lower Court, it appears that at least one other circuit has issued a post-*Porter* decision that conflicts with the decision of the Fifth Circuit in the *Tex Tan* case. *See N.L.R.B.* v. *Shurtenda Steaks, Inc.*, 424 F.2d 192, 195 (10th Cir. 1970). For the additional reason that this Court's decision in the *H. K. Porter* case has not received uniform application by the Circuit Courts, the Petitioner urges this court to grant the Petition for a Writ of Certiorari so that the decision of the lower Court in this case may be reviewed.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Petitioner

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Dated at Lincoln, Nebraska
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,570

National Labor Relations Board, Petitioner,
v.
Ralph Printing & Lithographing Company, Respondent
On Petition for Enforcement of an Order of the National Labor Relations Board.
[September 25, 1970.]

Before BLACKMUN,* MEHAFFY and ERIGHT, Circuit Judges.

MEHAFFY, Circuit Judge.

The National Labor Relations Board has petitioned this court to adjudicate respondent, Ralph Printing & Lithographing Company, in civil contempt for allegedly failing and refusing to comply with the decree of the court entered July 6, 1967 in *NLRB* v. *Ralph Printing & Lithographing Co.*, 379 F.2d 687 (8th Cir. 1967), which granted enforcement of the Board's order in *Ralph Printing & Lithographing Co.*, 158 NLRB No. 128, 62 LRRM 1233, as modified. The Company was ordered to recognize and bargain collectively with the Lithographers and Photoengravers International Union, AFL-CIO, and to cease and desist from interfering with the employees' self-organizational rights.

When the petition was filed alleging that the Company had not complied with the decree and asking that

* Mr. Justice Blackmun, who sat on this panel as a member of this court before his elevation to the United States Supreme Court, did not participate in the consideration or decision of this case.

it be adjudged in contempt, the matter was referred to a Special Master, The Honorable Robert Van Pelt, to conduct a hearing and report to this court his findings of fact, conclusions of law and recommendations. On October 2, 1969 the Special Master issued his report stating that it was his recommended conclusion that the Company has violated both the letter and intent of the decree in that it bargained in bad faith, refused to execute the contract when agreement had been reached even though the Company's negotiator had the authority to do so, and granted wage increases to certain employees during a period when the Union was the collective bargaining agent and when contract negotiations were in progress, all in violation of the decree. We adopt the findings and recommended conclusion of the Special Master as summarized below.

On October 3, 1967 the parties commenced bargaining. The Company was represented throughout the negotiations solely by attorney John E. Tate, and the Union was represented by various Union officials and employees including Mel Galbraith, a representative of the International Union, and Dale Bahn, President of the Local Union. At all times during the negotiations the Company fully cooperated with the Union with respect to fixing times and places for negotiation and furnishing information desired by the Union. On March 5, 1968, while negotiations were in progress, the Union caused an unfair labor practice charge to be filed against the Company alleging that it had improperly granted pay raises and had refused to bargain over job classification. On March 6, 1968 a bargaining session was held after which only three issues were left in dispute, the vacations clause, holidays clause and job classification. Immediately after the meeting the employees voted to drop their demands on these items and accept

the contract.

The following morning, March 7, 1968, the Union negotiator obtained authority from International to accept the contract without these clauses and to sign the contract without further International approval. On the same date the Union's negotiator called Tate's office and asked his secretary to inform Tate that the Union was ready to sign a final contract incorporating only those provisions already agreed upon. He wrote Tate to the same effect on March 12, 1968 and, in Tate's reply, he complained about the unfair labor practice charge and stated that he had no idea what the Union's negotiator was talking about. On March 20, 1968 Tate was again contacted and responded that he would draft a completed contract embodying the agreed-upon terms by March 28, 1968. This was done and a copy was sent by Tate's office to the Union and also to the President of the Company, Joe Peer, advising that it was a final agreement. Tate also talked with Clifton Batchelder, the owner of the Company, concerning it.

On April 2, 1968 the Union negotiators met with Tate for the agreed purpose of executing the contract. They went through it and made a number of minor changes in the wording and initialed these changes. Thereafter the Union negotiators signed the contract and presented it to Tate who informed them for the first time that he did not have the authority to sign it but would submit it to Batchelder and give the Union an answer in forty-eight hours. The Company subsequently refused to sign the agreement as written and an attempt was made to bargain further. After several meetings Tate sent the Union a proposal on April 16, 1968, to which the Union never responded.

The Special Master found that a final agreement

had been reached and that Tate had the authority to bind the Company. Although Batchelder testified that he never gate Tate the authority to enter into a binding agreement without prior Company approval, the Master found that this was not borne out by other relevant evidence. The Company's counterproposal on October 18, 1967 contained the statement that "if the word of the Union representatives here is final then so is that of the Company negotiator." The Company contended, however, that it did not know that the word of the Union representative would be final and that the subsequent approval of International would not have to be sought. Additionally, Tate clearly indicated on several occasions during negotiations that he had authority to bind the Company.

The Master further found that even if actual authority were found to be lacking, Tate had apparent authority since he indicated that he had authority and did not advise otherwise. See *Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 524 v. Billington*, 402 F.2d 510 (9th Cir. 1968); *United Steelworkers of America* v. *CCI Corp.*, 395 F.2d 529 (10th Cir. 1968), *cert. denied*, 393 U.S. 1019 (1969). After the Union negotiators signed the contract, Tate was under a duty to sign also upon the Company's prior representation that "if the word of the Union representatives is final then so is that of the Company negotiator."

While a collective bargaining contract need not be written to be enforceable, *Warrior Constructors, Inc. v. International Union of Operating Engineers, Local Union 926, AFL-CIO*, 383 F.2d 700 (5th Cir. 1967), refusal to execute an agreement incorporating the terms of a negotiated contract when requested is an unfair labor practice. See *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 526 (1941); *NLRB* v. *Ogle Protection Serv., Inc.*,

375 F.2d 497, 500 (6th Cir. 1967), *cert. denied*, 389 U.S. 843 (1967); *NLRB v. Ohio Car & Truck Leasing, Inc.*, 361 F.2d 404, 406 (6th Cir. 1966). *Cf. NLRB* v. *Strong*, 393 U.S. 357, 361 (1969).

Judge Van Pelt also found that the Company violated this court's order by granting pay raises to certain employees. Mr. Tate had advised Company officials that they were precluded from continuing their merit increases after the order to bargain but this was disregarded. The Union was not apprised of any of the raises prior to the time they were given nor was it given an opportunity to bargain over them. We agree with the Special Master's recommendation that the Company should be held in contempt.

The question of the intent with which the claimed acts were done is not material unless the acts are equivocal and resort to the intent with which they are done is necessary to make their meaning clear. *NLRB* v. *Whittier Mills Co.*, 123 F.2d 725, 727 (5th Cir. 1941). If the acts done are clearly in contravention of the court's decree, the intention is of no consequence. The absence of wilfulness does not relieve an individual from civil contempt since it is a sanction to enforce compliance with an order of the court and is not dependent on the state of mind of the respondent. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1948). The Board, nevertheless, has the burden of proving the alleged contempt and demonstrating it by clear and convincing evidence. *W. B. Johnston Grain Co.* v. *NLRB*, 411 F.2d 1215, 1217 (10th Cir. 1969); *NLRB* v. *Alamo Express, Inc.*, 395 F.2d 481, 482 (5th Cir. 1968). We hold that it did so.

The requirement that the Company bargain collectively with the Union requires that it bargain over

wages, hours and other terms and conditions of employment. Generally speaking, a unilateral change in wages without first contacting the Union and granting it an opportunity to negotiate amounts to a refusal to bargain and constitutes a violation of 29 U.S.C. § 8 (a)(5). See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962); *NLRB* v. *Frontier Homes Corp.*, 371 F.2d 974, 979 (8th Cir. 1967). Furthermore, such conduct constitutes a violation of the duty to bargain collectively even absent a subjective showing of bad faith. *NLRV* v. *Katz, supra*; *NLRB* v. *Newberry Equipment Co.*, 401 F.2d 604, 609 (8th Cir. 1968). An exception to this rule is where increases in wages are merely aimed at maintaining the status quo. Where there is a well-established company policy of granting certain increases at specific times, which is a part and parcel of the existing wage structure, the company is not required to inform the union and bargain concerning these increases. *NLRB* v. *Southern Coach & Body Co.*, 336 F.2d 214, 217 (8th Cir. 1964). This is also true where raises are the result of a change in job or where there is a differential between skilled and unskilled employees and salaries are adjusted to maintain that differential. The latter category seems to be limited to situations where the customary differential is decreased or diminished by some external force such as by a rise in the minimum wage. However, discretionary increases in pay based upon management's assessment of the performance of an individual employee are not allowed. See *NLRB* v. *Southern Coach & Body Co., supra.*

The Special Master classified the types of pay raises granted here into three categories. The first category includes those employees whose raises the Company sought to justify on the basis that they were granted pursuant to the individuals' hiring agreements, which

had been a long-time practice of the Company. However, there was no specific time interval between hiring and the guaranteed raise, it depending solely on the Company's determination of the employee's proficiency and attitude. The Special Master noted that these unilateral raises are exactly the type which were condemned in *Katz*, *supra*, and that the Company had a duty to inform the Union and give it an opportunity to bargain concerning them.

The second type of wage increase was that which the Company contended was necessary in order to maintain the proper differential between skilled and unskilled bindery workers after the federal minimum wage was increased. It appears that there was a Company policy to maintain a 40-cent differential between skilled and unskilled bindery workers, and that differential was substantially diminished by the increase in the federal minimum wage, which was an external force wholly outside the Company's power to control. However, the raise was not sufficient to reestablish the prior differential and the Special Master found that while it was an attempt to maintain the status quo, it did not do so and therefore did not fall within the exception but was actually a change in wage over which the Company had a duty to bargain with the Union.

The third type of wage increase was allegedly granted because the workers moved to more complex equipment. The evidence showed, however, that there was no established rate for operators of this equipment and that the employees did not receive an increase at the time they changed jobs but only after they had become proficient in the operation of the machines. The Special Master therefore found that the reason for the increase in wages was based on the Company's uni-

lateral evaluation of the employees' proficiency and not on the type job itself, and therefore the raises were the proper subjects for bargaining.

The duty to notify the Union regarding proposed unilateral changes requires that notice be reasonably calculated to afford the Union an opportunity to bargain concerning the proposed changes. *NLRB* v. *United Nuclear Corp.*, 381 F.2d 972, 976-977 (10th Cir. 1967). The Special Master found that there was never any specific notification or discussion regarding proposed unilateral pay raises, and that the Union did not find out about them until after they were granted and therefore the Company had failed to bargain collectively with the Union as required by this court's decree.

Although the evidence is in conflict and the Company has made a persuasive argument here, the Master's findings of fact are binding upon this court unless clearly erroneous. 28 U.S.C., Fed. R. Civ. P. 53(e)(2); *W. B. Johnston Grain Co.* v. *NLRB*, *supra*, 411 F.2d at 1217; *NLRB* v. *Alamo Express, Inc.*, *supra*, 395 F.2d at 482. The hearing was conducted by an able and distinguished district judge, and he has given meticulous consideration to all of the evidence. There is ample evidence to support the Master's conclusion, and we cannot therefore say that his findings are clearly erroneous.

It is ordered, adjudged and decreed that Ralph Printing & Lithographing Company is in civil contempt of this court and that said Company, through its officers and agents, shall purge itself of said contempt by:

1. Notifying Lithographers and Photoengravers International Union, AFL-CIO and its Local 203, Lithographers and Photoengravers International Union, AFL-CIO, (hereinafter collectively called the Union) within

fifteen days from the entry hereof in writing that upon request of said Union it will execute the agreement concluded in April 1968 with Local 203.

2. If so requested by said Union, executing said agreement and delivering the executed copy to the Union within five days of the receipt of such request, and thereafter honoring it in good faith.

3. Otherwise fully complying with and obeying the said decree of the court including but not limited to refraining from offering, promising or granting to its employees wage increases or other benefits or instituting changes in terms and conditions of employment without first affording the Union notice and reasonable opportunity to bargain thereon.

4. Reimbursing its employees for all losses of wages and benefits as may have been lost by said employees by reason of the Company's unlawful refusal to execute the aforesaid agreement, together with interest at the rate of 6% per annum. If the parties cannot agree on the amounts of such losses, if any, the amounts shall be computed by the Board as in a backpay proceeding and submitted to the court for further review.

5. Commencing twenty days from the date hereof, posting in conspicuous places including all places where notices to employees are customarily posted for a period of sixty consecutive days, a notice, signed by the Company by an officer thereof, which states that the Company has been adjudicated in civil contempt for disobedience of the court's decree as set forth in this order, copy of this order to be posted with said notice, and that the Company has complied with the requirements of paragraphs 1 and 2 above, and that the Company will take the other action in purgation ordered by the court, and will maintain such notices and a

copy of this order in clearly legible condition throughout such posting period, taking reasonable precautions that they are not defaced, altered or covered by any other material.

6. Filing a sworn statement with the Director of the Seventeenth Region of the Board notifying said Director in writing within twenty days after the entry of the order showing what steps have been taken by the Company to comply with the court's directions, and again at the end of the posting period showing that the Company has brought itself and maintains itself in compliance with the decree and this order.

7. Paying to the Board all court costs incurred in this appeal. The prayer of the Board for attorneys' fees and expenses of investigation is denied.

In order to insure compliance with the foregoing provisions, it is further ordered that upon the failure of respondent, its officers and agents to purge itself of contempt as herein provided, this court will deal further with the matter by imposing upon respondent a compliance fine of $500.00 and a further compliance fine of $100.00 per day for each day of continued noncompliance and by such other means as the court may direct, including the issuance of body attachment upon any officer or agent responsible for such noncompliance.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, EIGHTH Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,570

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

RALPH PRINTING & LITHOGRAPHING COMPANY, Respondent.

REPORT OF SPECIAL MASTER RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

VAN PELT, District Judge, sitting as Special Master

This matter is for hearing upon the petition of the National Labor Relations Board requesting that Ralph Printing & Lithographing Company be adjudged in civil contempt of a Decree of the Court of Appeals for the Eighth Circuit. An order to show cause was issued and the matter has been referred by the Court of Appeals to the undersigned as special master. Pursuant to the order of the Court of Appeals of September 17, 1968, a hearing has been held at which evidence was received. This evidence has been transcribed, the parties have filed briefs, and the matter now stands ready for determination. The order of the Court of Appeals appointing the undersigned as special master requires that findings of fact be made along with recommendations as to conclusions of law. Accordingly, I proceed to set out findings of fact regarding the petition of the Board and the answer of Ralph Printing and the issues raised therein. References herein to "Tr."

refer to the page of the Transcript relied upon by the Master.

Findings of Fact

1) On July 6, 1967 the United States Court of Appeals for the Eighth Circuit entered a decree enforcing an order of the National Labor Relations Board. The Decree, in substance, ordered: (a) That Ralph Printing and Lithographing Company (hereinafter called the Company) recognize the Lithographers and Photoengravers Union, AFL-CIO and its local representative, Local 203 (hereinafter called the Union) as the exclusive bargaining representative of all the employees in the appropriate unit; (b) That the Company bargain collectively with the Union in such capacity; (c) That if an understanding is reached it should be embodied in a signed agreement; (d) That the Company should cease and desist from (1) granting benefits to its employees to induce them to refrain from becoming members of the above-mentioned International or its Local, and (2) other acts by the Company calculated to discourage collective bargaining of Union membership.

2) On October 3, 1967, the parties commenced bargaining. The Union's negotiators were International Union representative Mel Galbraith, Local 203's President, Dale Bahn, and a group of Company employees (Tr. 30). The Company was represented at all times throughout the negotiations solely by attorney John E. Tate (Pet. IV, ¶ A.1; Amended Answer IV).

3) The Company at all times during the negotiation fully cooperated with the Union, with respect to fixing times and places for negotiation, and with respect to furnishing information desired by the Union

(Tr. 75-76, 116, 344, 411, and 414). Pursuant to arrangement, negotiations were held on October 3, 1967, October 18, 1967, November 13, 1967, January 3, 1968, March 6, 1968, and on April 2, 1968.

4) At the October 3, 1967 meeting, the Union presented a draft setting forth its opening proposals and specifically reserved the right to have its international president approve any agreement reached through the negotiations (Tr. 29-30, Ex. 2).

5. Mr. Tate submitted the Company's counterproposal at the October 18, 1967 meeting (Ex. 4). This document clearly stated that: ". . . If terms agreed to in bargaining sessions are subject to acceptance or rejection of union members later than this Company officialdom reserves the same right of final acceptance or rejection of the terms entered into here by its negotiator. If the word of the union representatives here is final then so is that of the Company negotiator." (Ex. 4) This was a specific reservation of right of approval as a matter of record (Tr. 343, 389). However, it was also clearly conditional and Tate knew this (Tr. 390). Tate not only made his authority to bind the company clear at other meetings (Tr. 169-70, 153, 158, 125 and 43) but in the pleadings it is specifically stated that: "At all times material herein the respondent's negotiator John E. Tate, has had authority to enter into a contract with the union, but at all times has reserved the right to obtain respondent's approval before he binds respondent to an agreement" (Amended Answer IX). Further, Mr. Batchelder never informed the Union as to any specific reservation of Mr. Tate's authority (Tr. 317) and he made no effort to discover what Tate was telling the Union (Tr. 321). In this negotiation Tate had full power to bind the Company sub-

ject to a specific, conditional, reservation of right of approval.

6. Throughout the remainder of 1967 the Company and the Union continued to bargain. The Union persisted in its demand for job classification and the Company through its negotiator, Mr. Tate, was steadfast in its refusal to acquiesce in this demand. By January 3, 1968 a number of items had been agreed on (Ex. 5, 6, and 7). At the January 3 meeting, the parties discussed items still in contention but were unable to agree on holiday, funeral leave, vacations, apprenticeship, duration of the contract, and a number of other items. The Union again demanded job classification and Tate again refused this demand and repeated his earlier offer of a flat 2 1/2% wage increase (Tr. 41-43, 83-84). At the close of the meeting, with the parties still unable to agree on several major items, Galbraith notified Tate that unless progress were made the Union would be forced to consider economic action (Tr. 114, 351-352).

7. On March 6, 1968, the parties met for further negotiations (Tr. 44, 355). At this meeting the Union was represented primarily by Ted Brandt, the international vice-president (Tr. 44, 356). At this meeting the Union presented their proposal for settling the entire contract (Ex. 8). This document provided that all previously agreed upon terms were to be included in the contract. It accepted the company's proposal on funeral leave without change and set forth other disputes clauses which it would accept with certain changes set out in the document. Brandt informed Tate that authority to sign a contract containing these provisions had already been obtained from the Union's International President (Tr. 176, 178-179). However,

the proposal contained the Union's demand for job classification. Tate reiterated his refusal to accept job classification and he countered with an offer to raise their wage increase proposal to 3% in order to get the contract concluded that night (Tr. 357). After some discussion of other issues and a number of proposals and counterproposals (Tr. 357) the meeting ended and the Union representative informed Mr. Tate that unless the Company capitulated on the job classification issue the Union would resort to legal recourse (Tr. 350, 356-357, 361).

8. On March 5, 1968, the Union caused an unfair labor practice charge to be filed against the employer, alleging that the Company had improperly granted pay raises and refused to bargain over job classification (Ex. I). The Union representative did not mention this charge to the employer's representative at the meeting of March 6, 1968 (Tr. 356, 361).

9. At the conclusion of the March 6, 1968 meeting only three issues were left in dispute (Tr. 44-47, 78-79). These were the vacations clause, holidays clause, and job classification. The following day, March 7, Mr. Peer was informed of this by Mr. Tate (Tr. 272, 404) and posted the following notice on the company bulletin board: "Our attorney had advised us that in negotiations last night the Union capitulated on all remaining contract points except job classification." (Ex. 10) And subsequently Tate wrote the National Labor Relations Board (Tr. 422) informing them that ". . . when the union broke off negotiations for the second time Wednesday night, March 6, there was agreement on everything except . . . classifying the workers. . . ." (Ex. 11).

10. Immediately after the March 6 meeting, the assembled Company employees voted to drop all of their remaining demands and to accept the contract offered by the Company (Tr. 47-48). On the following morning, Bahn obtained authority to accept the Company's terms from the International Union (Tr. 48). As of this date, the Union no longer required International approval of the contract and its negotiators' acceptance would be binding. On the morning of March 7, 1968 Mr. Bahn called Tate's office and asked his secretary, Miss Tatania Warman, to inform Tate that the Union was ready to sign a final contract incorporating only those provisions already agreed upon (Tr. 48-50). Tate himself testified that he was "pretty sure" that Bahn had told him at the April 2 meeting that he, Bahn, had already received authority to sign the contract (Tr. 392).

11. On March 8 Mr. Peer caused Exhibit 10 to be replaced with another notice which advised that the Company had been charged with an unfair labor practice "because we granted a few pay raises." (Tr. 289, 290) Mr. Peer did not label this notice as his interpretation of the unfair labor practice charge (Tr. 294). Mr. Peer found out that the notice was an incorrect statement of the charge in a discussion with Mr. Tierney on April 9 but he made no attempt to change or explain the notice (Tr. 294-295).

12. On March 12, Bahn wrote to Tate and again stated that the Union was ready to sign a contract incorporating only those terms to which the Company had already agreed. Tate replied complaining about the filing of the unfair labor practice charges and stating that he had "no idea" what Bahn was talking about (Ex. 9, Tr. 51-52). On March 20, 1968, Bahn telephoned

Tate and repeated the Union's position. At that time Tate responded that he would draft a completed contract embodying the agreed upon terms for signature on March 28 (Tr. 53). On March 25, Tate wrote Bahn and requested that the meeting be postponed until April 2 and again stated his intention to have the contract ". . . completed in final form . . . as I understand it." (Ex. 12, Tr. 397) Again, on March 28 he wrote to Bahn stating that it was his understanding that the Union agreed to drop demands for Interval President approval, job classification, and other specific demands as well as ". . . all other items not included in the contract." (Ex. 13, Tr. 398) Finally, on or about March 28, 1968, Bahn received from Tate a copy of a contract incorporating the agreed upon terms and accompanied by a cover letter which read as follows: "I surely hope I understand Mr. Tate's notes correctly. He is in San Diego, but he asked me to send you a final draft for signature at the Tuesday night meeting." (Ex. 14, 16, Tr. 55, 398-401) Tate also sent copies of the contract and accompanying letter to the Company president, Joe Peer (Tr. 283-285) who read the contract and letter and noted that the letter stated that this was a final agreement and that it included a 100% Health and Welfare clause (Tr. 283-287). He then called Mr. Batchelder on April 2 and discussed the terms with him (Tr. 286).

13. The Union negotiators met with Tate for the specifically agreed upon purpose of executing the contract on April 2 (Tr. 56-57). Tate noting that his secretary had erroneously included a grievance procedure clause in Bahn's copy of the contract (Ex. 16), produced a corrected copy, and the parties went through it and made a number of minor changes in wording, each of which was initialed by Tate and Bahn (Tr. 57-58, 59-60, 416-419, Ex. 15). Although Bahn did not specifically

tell Tate that International approval was no longer necessary (Tr. 125-126), he and Mrs. Colyer, the Union vice-president, did tell Tate that he had authority to sign for the unit on April 2, 1968 (Tr. 178, 125, 392-393). Thereafter, both signed the document (Tr. 60-61, 139, 392-393), and filled in the effective date of contract space in Tate's presence (Tr. 407). They then presented it to Tate for his signature and for the first time during that meeting he stated that he did not have authority to sign it. Instead he stated that he would submit it to Batchelder and give them an answer in 48 hours (Tr. 62, 392).

14. The April 2 document did contain a company rules and regulations provision (Ex. 16, ¶ XIX), but it also contained a clause which stated that: "The minimum wage scales appended to this contract shall continue without change during the life of this contract." (Ex. 16, ¶ II). These contemplated attachments were not present. It was, however, Mr. Bahn's understanding that they would be added at a later time (Tr. 78-79).

15. When Bahn received no word from Tate on the April 2 agreement by April 5th, he called Tate's office and asked that Tate call him (Tr. 62-62). Tate did not return the call. After a conversation with Mr. Tierney, the N.L.R.B. attorney who was investigating the unfair labor charge (Tr. 64, 126), Bahn contacted Mr. Peer to discuss the April 2 agreement (Tr. 227). Pursuant to this call the two men met on April 12, 1968 in Peer's office to discuss the contract (Tr. 63-66, 225). Mr. Bahn did not inform Tate of this meeting (Tr. 126, 129). At this meeting the two briefly went over the contract (Tr. 67, 226). In addition, the men discussed night premium pay and the holiday pay clause and Mr.

Bahn wrote out the proposed job classification which the Union had previously proposed (Tr. 131, 226-227, Ex. 17). Peer told Bahn that he did not have any authority to make such changes (Tr. 226-227). Then Peer raised the matter of the 100% Health and Welfare clause in the April 2 document and verbalized his disapproval of this. He stated that more trading could be done on that point (Tr. 228). To this Bahn stated that he did not have authority to make such a change (Tr. 68-69, 229, 280). There was no agreement to make any change in the April 2 document (Tr. 69) and finally Bahn requested Peer to discuss the April 2 agreement with Mr. Batchelder in an attempt to get him to sign the April 2 agreement (Tr. 69, 283).

16. On April 15, 1968, the Company owner, its president and its negotiator met to discuss the situation. The determination was made that they could not accept the 100% Health and Welfare Clause (Tr. 315, 326-329). Accordingly, Tate sent the Union a letter dated April 16, 1968, proposing that job classification and 10% night premiums be granted in exchange for a reduction of the company's health and welfare contribution from 100% to 50% (Ex. 18). The Union has never responded to this proposal.

17. Throughout the bargaining period, the Company granted pay raises to certain employees. The first group of names listed in Ex. B were employees who were granted raises throughout the period beginning August, 1967 and ending September, 1968. In addition to these individuals, Larry Salerno was hired on August 28, 1967, and received a raise to $1.85 on February 28, 1968 and an additional raise to $1.95 on August 28, 1968. Robert Blake was granted a raise on August 3, 1967 raising his rate of pay from $2.40 per

hour to $2.50 per hour. David Lines received a raise from $2.80 per hour to $2.90 per hour on July 13, 1967 (Tr. 150).

The individuals in the first list in Exhibit B were told that they would start at a specific wage and that this would be increased as their proficiency increased (Tr. 254, 255, 262, 265). No fixed time table was set for raises (Tr. 262, 263, 245). Such raises were granted solely on the basis of a unilateral determination by the company as to the individual employee's attitude and proficiency (Tr. 245). Salerno, Blake, and Lines were similarly given raises based on proficiency and attitude (Tr. 241-243). In fact Mr. Lines' increase was the result of a dramatic increase in proficiency (Tr. 242).

The four employees listed at the bottom of page one of Exhibit B received raises in February of 1968. These raises were prompted by an increase under the federal minimum wage law. The Company felt that such raises were necessary in order to maintain the correct differential between experienced, skilled bindery help and those newly hired (Tr. 246). After the raise these employees were engaged in the same type of work (Tr. 248). Similarly, Bernadette Gabriel was granted a raise as of February 1968 because of the raise in the minimum wage and due to her increased efficiency (Tr. 249).

Other raises were given to Manuel Maldonado and to Warren York. These raises were granted in August, 1968 and December, 1967, respectively, and were the result of the employees moving to larger and more complex presses (Tr. 248, 249). Finally, Kenneth Copley was raised from $2.32 to $2.47 in September of 1967. This raise was given to reward the employee for his

good attitude and work habits, as well as to assure him that he would not be fired on account of his advancing age (Tr. 250).

18. Mr. Peer was told by Mr. Tate, in July of 1967, that the Company was precluded from continuing to grant merit increases to employees after the Eighth Circuit's order to bargain (Tr. 305-306). However, he went ahead and did grant the raises previously discussed without discussing them with Tate (Tr. 252). On April 9, 1968 Peer was told by Tierney that these raises were questionable (Tr. 255-256), and in July or August of 1968 Tate asked him if these raises were given and informed him that they were not legal (Tr. 257-259). Nevertheless, several raises were subsequently granted (Ex. B, Tr. 258-259). The Union was not apprised of any of the wage increases nor were they given an opportunity to bargain over them (Tr. 39, 40). After finding out about the raises herein set forth, the Union, on March 5, 1968 filed unfair labor practice charges with the Board alleging that the Company had violated Section 8(a)(5) of the Act by granting the raises and by refusing to bargain over job classification (Tr. 383, Ex. I).

CIVIL CONTEMPT

In the instant case there is no claim that the injunction failed to state in sufficiently specific terms the required or prohibited acts, *Longshoremen* v. *Marine Trade Assn*, 389 U.S. 64 (1967). Instead, the respondent, Ralph Printing, was ordered by the court to recognize and bargain collectively with the Lithographers and Photoengravers International Union, AFL-CIO (hereinafter called the Union); and if an understanding was reached to embody such understanding in a signed agreement (See July 6 Decree and Order).

The ultimate determination, of course, is whether the conduct of the Company herein has contravened the Decree of the Court of Appeals and is therefore in contempt of that Decree. In makig this determination it should be noted that the individual's intention may be relevant where the act or acts are equivocal in their import. For example, where the act if done is not clearly in contravention of the activity proscribed in the court's decree, this intention is relevant. *N.L.R.B.* v. *Whittier Mills Co.*, 123 F.2d 725 (5th Cir. 1941). However, where the acts if done are clearly in contravention of the court's decree, then the intention with which they are done is of no consequence. The Supreme Court in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 189, 191 (1948) stated:

> "The absence of willfulness does not relieve [an individual] from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. [citations omitted] Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of the respondents. It laid on them a duty to obey specific provisions of a statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently."

See also *Babee-Tenda Corp.* v. *Scharco Mfg. Co.*, 156 F. Supp. 582 (D.C.S.D. N.Y. 1957). A party has a duty to follow through and to take all affirmative steps necessary to comply with the court's directions. Even lack of knowledge is not a defense where the defendant by the exercise of reasonable diligence should have known

of the acts in violation of the decree. *Babee-Tenda Corp., supra,* at 587.

Thus, while care, caution and deliberation should be used in applying the power to punish for civil contempt, Barron's § 2428, at 381-83, the foregoing discussion defines the criteria by which the particular conduct is to be examined. Finally, it should be noted that the Board has the burden of proving the alleged contempt and demonstrate it by clear and convincing evidence. *Kansas City Power & Light Co.* v. *N.L.R.B.*, 137 F.2d 77 (8th Cir. 1943); *N.L.R.B.* v. *Standard Trouser Co.*, 162 F.2d 1012 (4th Cir. 1947).

UNILATERAL WAGE RAISES

It is the contention of the Board that the Company violated the terms of the July 6 Decree in that it granted unilateral wage raises to certain employees subsequent to the time the Union was established as the collective bargaining agent. The Union took no part in the determination of the amount of the raises or the employees who were to receive them.

It is alleged that such raises not only breach that portion of the Decree which orders the company to cease and desist from granting benefits to its employees in an attempt to induce them to not join the Union, but also that such raises under the circumstances herein, in themselves, constitute a breach of the Company's duty to bargain collectively as ordered by the Court of Appeals.

Title 29 U.S.C.A. § 158(a)(5) states that it will be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." Further, 29 U.S.C.A. § 158(d) defines the duty to bargain collecti[illegible] as:

> ". . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

Thus, it is clear that the requirement that the Company bargain collectively with the representative of its employees requires that it bargain over the mandatory subjects of "wages, hours, and other terms and conditions of employment." Further, it is clear that a unilateral change in one of these areas without first contacting the Union and granting it an opportunity to negotiate over the proposed change, is legally tantamount to a refusal to bargain and constitutes a violation of § 8(a)(5) [29 U.S.C.A. § 158(a)(5)], *N.L.R.B. v. Frontier Homes Corp.*, 371 F.2d 974 (8th Cir. 1967).

In addition, such conduct constitutes a violation of the duty to bargain collectively even absent a subjective showing of bad faith. *N.L.R.B.* v. *Katz*, 369 U.S. 736, 743 (1962). The court stated in *Katz supra*, that:

> "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the board may hold such unilateral action to be an unfair labor practice in violation of § 8(a)(5) without also finding the employer guilty of over-all subjective bad faith." at 747.

See also *N.L.R.B.* v. *Newberry Equipment Co.*, 401 F. 2d 604, 409 (8th Cir. 1968); *N.L.R.B.* v. *Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965).

There is one exception to this rule. Increases in wages which are merely aimed at maintaining the status quo are not, absent a showing of subjective bad faith, violations of Section 8(a)(5). This rule recognizes situations where there is a well-established company policy of granting certain increases at specific time intervals and arguably in certain amounts. Such raises are not really changes in wages but are, in fact, part and parcel of the existing wage structure. Thus, in these types of raises the company is not required to inform the union of their action prior to unilateral action. *N.L.R.B.* v. *Southern Coach and Body Co.*, 336 F.2d 214 (8th Cir. 1964). This rationale may similarly be applied to situations where there has been an established wage differential between certain jobs or job classifications and where raises are the result of a change in job. *Southern Coach and Body Co., supra*, or to cases where there is a differential between skilled and unskilled employees and salaries are adjusted to maintain that differential. However, this last category would seem to be limited to situations where the customary differential was decreased or diminished by some external force; for example, by a rise in the minimum wage. Only in such a situation as this could it be justified on the basis of a continuation of the status quo rather than be characterized as a "change" in wage.

Whether a unilateral raise in wages is a change or merely a maintenance of the status quo depends on two factors. First, is the existence of an established company practice and the second is whether the raises were in any sense automatic or whether they were instead ". . . informed by a large measure of discretion." *N.L.R.B.* v. *Wonder State Mfg. Co., supra*, at 215. Merit increases, those that are ". . . discretionary increases in pay based upon management's assessment of the per-

formance of an individual employee", are not allowed. *N.L.R.B.* v. *Southern Coach and Body Co., supra,* at 218. In addition:

> "This action [the granting of certain raises] too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8(a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semi-annual merit reviews—in effect, were a mere continuation of the status quo—differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases." *Katz, supra,* at 746, 7

An additional issue has been raised as to whether the rule of *Katz, supra,* is applicable to unilateral wage increases which occur prior to the commencement of negotiations. It would appear that the duty to bargain collectively with the representative of the employees arises when that representative is designated. Further it can not be denied that the duty to bargain arose in this case at least as early as July 6, 1967, for it was on that date that the Court of Appeals ordered the Company to bargain. To state that the conduct proscribed in *Katz, supra,* is in violation of the statutory duty to bargain only after netotiations have commenced seems inconsistent with the fact that the duty arises prior to

that time and has not been extingushed. A unilateral wage increase prior to negotiations but subsequent to the designation of the representative of the employees appears to undermine the union's position as a representative of the employees, it frustrates the congressional policy, and is equally tantamount to a flat refusal to bargain as similar action taken after negotiations have actually begun. It does not seem logical that the protection of the statutory duty to bargain should rest on so fortuitous an event as the date of the first bargaining session. Unilateral increases are allowed where an impasse in bargaining has been reached. In such a situation, the parties, although failing to reach agreement, have fulfilled their respective duties. However, where the impasse is due to a lack of good faith on the part of the company, the courts will not recognize the impasse as a justification for unilateral action. *N.L.R.B.* v. *Safeway Steel Scaffolds Co. of Ga.*, 383 F.2d 273 (5th Cir. 1967), and cases cited therein. In the latter instance, the parties have not discharged their duty to bargain. Even though negotiations are suspended, the same policies are relevant to unilateral action here as are applied where the action takes place during negotiations. The duty exists, and it is protected regardless of existence or nonexistence of bargaining sessions.

In the present case, there are basically three types of pay raises. The first type appears to be characterized by the first eight names listed in Exhibit B and by stipulations entered into by counsel relating to raises granted Larry Salerno, Robert Blake, and David Lines (Tr. 150-151). The Company seeks to justify these raises on the basis that they were granted pursuant to the individuals' hiring agreements and that such agreements had been a long time practice of the Company.

However, the Company president clearly testified that no specific time interval between hiring and the guaranteed raise was established (Tr. 262, 263, 245). Instead, he stated that these raises were granted solely on the basis of a unilateral determination by the Company as to the individual employee's attitude and proficiency (Tr. 241-243, 245). It appears that the raises granted to Bott, Glasebrook, Blake and Lines were all granted subsequent to the decree enforcing the Board's order but prior to the first bargaining session. The other raises in this first group were granted at various times between October of 1967 and September of 1968. These raises, based as they were on a great degree of Company discretion both as to timing and amount, are not within the status quo exception to the rule set forth in *Katz, supra.* In fact, these are exactly the type of unilateral raises which were condemned in the previously quoted language of that decision.

It is therefore apparent that with respect to these raises the Company had a duty to inform the Union and to give the Union an opportunity to bargain as to the procedures and criteria for determining such increases.

The second type of wage increase is that granted in February of 1968 to the four individuals listed at the bottom of the first page of Exhibit B. The Company president testified that these raises were necessary in order to maintain the proper differential between skilled and unskilled bindery workers after the federal minimum wage was increased (Tr. 248). In this circumstance, there appears to be a company policy of maintaining a 40 cent differential between skilled and unskilled bindery workers. Further, this differential was substantially diminished by the increase in the federal minimum wage. This was, of course, an ex-

ternal force which was wholly outside the Company's power of control. If, in fact, the differential had been reestablished by the raises it would appear that there would be no change but a mere continuation of the status quo. In *N.L.R.B.* v. *Southern Coach and Body Co.*, 336 F.2d 214 (5th Cir. 1968), the court held that raises in pay due to shifts in jobs were not violative of Section 8(a)(5) where the rates for the jobs were previously well established and were not changed. In the present case, there was an established differential and a change was required by a wholly external force. Absent a change in the differential itself there would seemingly be no basis for objection. However, here there was a change in the differential itself. The raise was not sufficient to reestablish the prior differential. There may have been an attempt to maintain the status quo but the result was really a change in wage.

Therefore, the Company had a duty to grant the Union an opportunity to bargain over these raises.

The third type of wage increase is that granted to Manuel Maldonado and Warren York. These raises were ostensively granted because these particular individuals were moved to larger and more complex equipment. However, there is no evidence that there was an established rate for these machines. There is no evidence that these raises were based on anything other than the Company's unilateral evaluation as to the individual's proficiency on the particular machine (Tr. 249). Here the timing as well as the amount of the raise was wholly discretionary and in no sense automatic. These raises were not granted at the time of the move to the new equipment but only after the Company had determined that the employee had become proficient. Thus, these raises, like those previously dis-

cussed, were the proper subjects for bargaining and should have been mentioned to the Union.

Raises were also granted to Kenneth Copley in September of 1967 and to Bernadette Gabriel on February 1, 1968. However, these raises, like those previously discussed, were wholly discretionary as to timing and amount and therefore did not qualify as merely being a continuation of the status quo.

It is therefore the recommended conclusion of this Master that the Company was required to notify the Union as to its proposed unilateral action and give it an opportunity to bargain over the procedures and criteria of the proposed increases. Failure to take this action constitutes a refusal to bargain, even absent a showing of bad faith, and violates the statutory command of Section 8(a)(5) as well as the decree of the Court of Appeals.

The duty to notify the Union regarding proposed unilateral changes requires that notice be given prior to the proposed changes and that the notice be reasonably calculated to afford the Union an opportunity to bargain concerning the proposed changes. *N.L.R.B.* v. *United Nuclear Corp.*, 381 F.2d 972, 976-77 (10th Cir. 1967); *N.L.R.B.* v. *Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). In the present case the record is not as complete on this point as one might hope. However, it is clear that the above standard was not met with respect to the unilateral changes under consideration herein. Some discussion as to raises may have taken place at the January and November meetings (Tr. 409). However, these discussions were not the result of the Company's consultation with the Union regarding pro-
—posed raises but were in fact an after the fact conversation incidental to the discussion of wage issues than

under negotiation (Tr. 9). The increases which were subsequent to the January meeting were never mentioned to the Union, and they, like the earlier raises, were discovered only when a new list of employee wages was submitted to the Union in March or April of 1968 (Tr. 410). This type of notification, or what might properly be called lack of notification, is insufficient to fulfill the statutory burden. In fact, it must be concluded as a matter of law, that there was never any *specific* notification or discussion regarding proposed unilateral pay raises. Thus, Mr. Bahn testified that no such discussions took place at either the November or at the January meeting (Tr. 39, 44).

Based on the previous discussion, it clearly appears that the Company in the present case has failed to bargain collectively with the Union regarding the aforementioned unilateral pay raises and has thereby violated the express order of the decree of the Court of Appeals.

THE COMPANY'S ALLEGED REFUSAL TO SIGN THE COMPLETED CONTRACT

The next question for determination is whether the Company refused to sign the completed agreement in such a manner as to be in violation of the decree of the Court of Appeals. This broad inquiry depends upon the determination of the following subissues. First, whether the Company negotiator, Mr. Tate, had authority to bind the Company, and secondly, whether a final agreement was, in fact, reached.

As to the first issue it should be noted that under present law there is no duty for the Company to have a representative at the bargaining table who has full authority to bind the Company without first seek-

ing prior approval. Thus, it does not "necessarily follow" that one hired to negotiate a collective bargaining agreement has full authority to bind the Company without its prior approval of the terms of the agreement. *N.L.R.B.* v. *Coletti Color Prints, Inc.*, 387 F.2d 298 (2nd Cir. 1967). The answer to this question must, therefore, be sought in the existence of either actual or apparent authority granted to the negotiator.

As to the existence of actual authority, Mr. Batchelder, the owner of the Company, testified that he never gave Tate the authority to enter into a binding agreement without prior company approval (Tr. 311-312, 343, 389-390). However, this is not borne out by the other relevant evidence on this point. Mr. Tate submitted the Company's proposal at the October 18th meeting (Exhibit 4). This document clearly stated that ". . . if the terms agreed to in bargaining sessions are subject to acceptance or rejection of union members later then this Company officialdom reserves the same right of final acceptance or rejection of the terms entered into here by its negotiator. *If the work of the union representative here is final then so is that of the Company negotiator.*" (emphasis added). This reservation of authority was clearly conditional and Tate knew this (Tr. 390). In addition, Mr. Tate clearly indicated on several occasions during the negotiations that he had authority to bind the Company (Tr. 169-170, 153, 158, 125, 43); and the Company's amended pleadings clearly state that "[a]t all times material herein the respondent's negotiator, John E. Tate, has had authority to enter into a contract with the Union but at all times has reserved the right to obtain respondent's approval before he binds respondents to an agreement." From this evidence it appears that the true nature of Mr. Tate's authority was set forth in

the pleadings and the conditional reservation in the original proposal. It follows that the Company's negotiator had full authority to bind the Company at all times during the negotiations subject to a conditional right of approval by Mr. Batchelder. If such a condition were abrogated, as the Master has found that it was, then Mr. Tate had full actual authority from that point on.

Even if actual authority were found to be lacking, it appears that Mr. Tate had the apparent authority to bind the Company to an agreement. *Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 524* v. *Billington,* 402 F.2d 510 (9th Cir. 1968); *United Steelworkers of America* v. *CCI Corp.,* 395 F.2d 529 (10th Cir. 1968). In the latter case the court held that apparent authority was made out where the company was never informed of the necessity of prior union approval of its negotiator's actions and where the union's representative's conduct gave every indication of complete authority. In the present case there is a similar situation. Thus, here the Union was seemingly never apprised that more than a conditional reservation of authority was reserved and the Company's negotiator gave every indication that he had full authority to bind the Company. In addition, here Mr. Batchelder never informed the Union of Tate's alleged limited authority (Tr. 317) and, in fact, never made any attempt to discover what he was telling the Union (Tr. 321). The Company president, Joe Peer, had received copies of both the October 18th proposal and the letter from Tate stating that the April 2 document would be a final draft for signature. He testified that he discussed the April 2 document and the cover letter with Mr. Batchelder prior to the meeting of April 2 (Tr. 285-286) and yet no attempt was ever made to apprise the Union of any lim-

itation in Mr. Tate's authority aside from that already mentioned. In view of these facts it would appear that even had this Master found that Tate did not have actual authority he nevertheless would have had implied apparent authority sufficient to allow him to sign a binding final contract.

Therefore, it is apparent that the Company negotiator, John Tate, had full authority to bind the Company to a complete collective bargaining agreement. As the finding of facts indicates, the Union prior to April 2 no longer needed approval of the International Union and was instead authorized to enter into an agreement. Tate knew this and agreed to draft the final contract. He had full authority to set the terms of the collective bargaining agreement and to bind the Company to those terms.

The next question is whether there was an agreement as of April 2, 1968. At the outset of this determination it is important to note that:

> "It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the over-all design of achieving industrial peace." *N.L.R.B. v. Insurance Agents, International Union, AFL-CIO,* 361 U.S. 477, 488 (1960)

Thus, the essential aim of the collective bargaining process is to allow the parties to reach a common ground of understanding without any interference from government or the judiciary in attempting to control or settle the substantive terms of the collective bargaining agreement. *N.L.R.B.* v. *Insurance Agents, International Union, AFL-CIO, supra; N.L.R.B.* v. *Won-*

der State Mfg. Co., 344 F.2d 210 (8th Cir. 1965). While these statements are often encountered in discussions of the good faith requirement of the bargaining process they seem equally applicable to the present determination. In this case the question is whether or not an agreement has in fact been reached. Where, as here, the evidence is in substantial conflict on this point, the Master must weigh carefully the various factors to assure that the ultimate determination is demonstrative of the parties' actual intent and not a judicial interference with the substantive terms of the agreement. The Board may order the parties to execute an agreement. First, however, it must show that there has been a complete agreement upon the terms of the contract. *N.L.R.B.* v. *Coletti Color Prints, Inc., supra.* In determining whether or not a complete agreement has been reached the parties' objective intentions must be ascertained and it is generally stated that the traditional concepts of the offer and acceptance are applicable. *Teamsters, Chauffeurs, Warehousemen & Helpers Local 524 v. Billington,* 402 F.2d 510 (9th Cir. 1968). However, it should be noted that a collective bargaining agreement is distinct from the ordinary contract for the purchase of goods and services and is therefore not strictly controlled by the traditional law of contracts. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *Brotherhood of Locomotive Firemen and Enginemen,* 397 F.2d 541, 545-46 (7th Cir. 1968). This is true not only in interpretation of such agreements but also in instances where the question of whether or not a contract in fact exists is at issue. The Court of Appeals for the Ninth Circuit in *Lozano Enterprises* v. *N.L.R.B.*, 327 F.2d 814, 818 (9th Cir. 1964), has specifically stated that:

> "We do not think that, in deciding whether, under a particular set of circumstances, an employer and a union have in fact arrived at an agreement that the employer is then obliged to embody in a written contract upon the union's request, the Board is strictly bound by the technical rules of contract law."

With this basic criterion in mind, the discussion will now turn to an examination of the facts of the instant case in an attempt to determine whether an agreement, which the employer was bound to sign, had, in fact, been reached.

In the present case, the testimony of the Union negotiator, Mr. Bahn, and that of the Company negotiator, Mr. Tate, are in direct conflict on this issue. Mr. Tate testified that as of April 2, 1968 the following clauses were unsettled: picket lines, duration of benefits, unprofitable departments, moonlighting, suits, article (b) of the representation clause, company rules and regulations, new machine processes, work requirements, and the time clock clause (Tr. 379-380). With respect to these clauses, it appears that the company rules clause set forth in Exhibit 4, ¶ XXVI, is exactly the same as that included in the April 2 agreement except for the requirement in the latter that such rules and regulations be posted (Exhibit 16). The work requirements clause in the Company's original proposal (Exhibit 4, ¶ XXXIX) also appears in the April 2 document (Exhibit 16, ¶ XXIV) with the addition of only the final clause.

With respect to the remainder of the disputed clauses, Mr. Bahn testified that they had either been dropped or bargained away during the course of the negotiations (Tr. 86-97). If this were the extent of the evidence relating to the existence of an agreement as of

April 2, 1968 this Master would have a difficult time finding that such an agreement existed. However, this is not the case and in view of the other relevant material the Master feels only one conclusion can be reached.

Mr. Bahn testified that as of the end of the March 6, 1968 meeting only three issues remained in dispute (Tr. 44-47, 78-79). These issues were the holiday clause, the vacations clause, and the Union's demand for job classification. On the following day Mr. Peer, the Company president, testified that he conversed with Mr. Tate and pursuant to that conversation posted a notice which read as follows: "Our attorney has advised us that in negotiations last night the Union capitulated on all remaining contract points except job classification." (Exhibit 10) On March 11, Mr. Tate wrote the Board regarding the unfair labor charge which had been filed. In that letter Mr. Tate stated that ". . . when the union broke off negotiations for the second time Wednesday night, March 6th, *there was agreement on everything except the union repeated for about the fifth time they could not and would not sign a contract unless we agreed to classifying the workers* because it was too much trouble to negotiate for each time a contract was negotiated." (Exhibit 11; emphasis added) Thus, as of this point in the negotiations it appears that an agreement on all of the terms of the proposed contract had been reached with the exception of the job classification issue.

Immediately after the March 6 meeting, the assembled Company employees voted to drop all of their remaining demands and to accept the contract offered by the Company (Tr. 47-48). On the following morning, Bahn obtained authority to accept the Company's

terms from the International Union (Tr. 48). As of this date, the Union no longer required International approval of the contract and its negotiators' acceptance would be binding. On the morning of March 7, 1968 Mr. Bahn called Tate's office and asked his secretary, Miss Tatania Warman, to inform Tate that the Union was ready to sign a final contract incorporating only those provisions already agreed upon (Tr. 48-50).

On March 12, Bahn wrote to Tate and again stated that the Union was ready to sign a contract incorporating only those terms to which the Company had already agreed. Tate replied complaining about the filing of the unfair labor practice charges and stating that he had "no idea" what Bahn was talking about (Ex. 9, Tr. 51-52). On March 20, 1968, Bahn telephoned Tate and repeated the Union's position. At that time Tate responded that he would draft a completed contract embodying the agreed upon terms for signature on March 28 (Tr. 53). On March 25, Tate wrote Bahn and requested that the meeting be postponed until April 2 and again stated his intention to have the contract ". . . completed in final form . . . as I understand it." (Ex. 12, Tr. 397) Again, on March 28 he wrote to Bahn stating that it was his understanding that the Union agreed to drop demands for Intervan President approval, job classification, and other specific demands as well as ". . . all other items not included in the contract." (Ex. 13, Tr. 398) Finally, on or about March 28, 1968, Bahn received from Tate a copy of a contract incorporating the agreed upon terms and accompanied by a cover letter which read as follows: "I surely hope I understand Mr. Tate's notes correctly. He is in San Diego, but he asked me to send you a final draft for signature at the Tuesday night meeting." (Ex. 14, 16, Tr. 55, 398-401) Tate also sent copies of the contract

and accompanying letter to the Company president, Joe Peer (Tr. 283-285) who read the contract and letter and noted that the letter stated that this was a final agreement and that it included a 100% Health and Welfare clause (Tr. 283-287). He then called Mr. Batchelder on April 2 and discussed the terms with him (Tr. 286).

Neither Mr. Batchelder nor Mr. Peer ever contacted the Union or Mr. Tate prior to the April 2 meeting.

It should be noted that Article II of Exhibit 16 provided that: "The minimum scales appended to this contract shall continue without change during the life of this contract." No such minimum scales were in fact appended.

Mr. Buhn testified that he thought that these were to be added to the contract at a later time. Certainly it is not clear that such scales were themselves to become a part of the contract and the testimony reveals nothing with regard to or how these scales were to be arrived at or who was to set them. In addition, there was no testimony to the effect that the compilation of such a listing was in dispute either as to means of compilation or as to whom was to compile the list. In these circumstances it seems that a fair inference would be that there was an understanding between the parties as to what was meant and that the exclusion of this alluded to appendage was a mere clerical mistake rather than evidence of a failure to agree.

As has been previously noted, the court is not bound to the strict rules of contracts in this determination and also it has been noted that a mere technical deficiency in the agreement is no defense to failure to sign if the desire not to contract with the Union in fact motivated the refusal. *N.L.R.B.* v. *Mayes Bros. Inc.*, 383 F.2d 242, 246 (5th Cir. 1967).

In light of the overall picture presented by this case and with the previous facts in view, it appears that the absence of this appended list is at most a technicality and at least merely an independent list never meant to be incorporated directly into the contract. In either case, it does not affect the conclusion that a full agreement was in fact reached by the parties.

It is therefore the finding of the Master that the objective manifestations of the parties clearly demonstrated that they had, as of at least April 2, 1968, agreed upon a completed collective bargaining agreement. It has previously been determined that Mr. Tate had authority to bind the company in these negotiations.

Part of the duty to bargain collectively with a union is the correlative duty to execute a written agreement incorporating any agreement which has been reached. *N.L.R.B.* v. *Olge Protection Service, Inc.*, 375 F.2d 497 (6th Cir. 1967); 29 U.S.C.A. § 158(d); *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514 (1941). In *H. J. Heinz Co.*, *supra*, at 526, the court stated:

> "The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining."

Refusal to sign a collective bargaining agreement ". . . discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining." *H. J. Heinz Co.*, *supra*, at 526. In *Heinz*, the Court specifically held that refusal to sign was a refusal to

bargain collectively and an unfair labor practice defined by section 8(b)(5).

It is therefore the recommended conclusion of the Master that an agreement had been reached, that the Union had signed and that the authorized agent of the Company refused to sign, stating instead that he would seek the approval of Mr. Batchelder (Tr. 62, 382). Further, it appears that Mr. Batchelder refused to sign the agreement and that after a delay of fourteen days the Company responded with a counter offer (Exhibit 18). Finally, it should be noted that the counter offer (Exhibit 18) did not mention or allude to any of the issues which the Company claims were still in dispute as of April 2, 1968. Instead, it states that the ". . . company is willing to finalize the agreement . . ." if the Union will accept 50% Company contribution to the Health Insurance program in exchange for the Company granting the Union's requested job classification proposal. In these circumstances it must be concluded that the Company refused to sign and in fact partially repudiated the previously reached collective bargaining agreement and thereby violated the specific requirement of the decree of the Court of Appeals ordering them to bargain collectively with the employees' representative.

It is also clear that the subsequent acts of the Union negotiator in approaching the Company president, Mr. Peer, in no way affected the existence of the previously reached collective bargaining agreement. The Master specifically finds that at that meeting on April 12, 1968 neither Mr. Peer nor Mr. Bahn in any way repudiated, rescinded or changed the original agreement (Tr. 69). While both individuals explained certain aspects of the agreement which they were not wholly in

favor of, the Union representative nevertheless sought only approval of the agreement as it stood and, in fact, he specifically asked Mr. Peer to see if he could persuade Mr. Batchelder to sign the April 2 agreement (Tr. 69, 283).

WHETHER THE RESPONDENT BARGAINED IN GOOD FAITH WITH THE EMPLOYEES' REPRESENTATIVE

Section 8(b)(3) expressly imposes a duty to bargain upon the Company. This duty is explained in more detail in Section 8(d). There it is stated that the duty to bargain includes the mutual obligation to ". . . confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." The final inquiry is whether the Company herein actually conferred "in good faith."

The determination of the presence or lack of good faith is of necessity based upon a subjective inquiry into the employer's state of mind. Good Faith Bargaining, 71 Harv. L. Rev. 1401, 1419 (1958). This, of course, depends upon the appraisal of the particular circumstances and facts of each case. *Majure* v. *N.L.R.B.*, 198 F.2d 735 (5th Cir. 1952). Thus, there is an obligation on the parties ". . . to deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or differences existing between them to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented." *N.L.R.B.* v. *Wonder State Mfg. Co.*, 344 F.2d 210, 215-16 (8th Cir. 1965).

In the pursuance of this duty the parties are not compelled to reach an ultimate agreement or even to offer concessions. *N.L.R.B.* v. *Wonder State Mfg. Co.*,

supra. Thus, while section 8(d) imposes a duty of good faith it also states that ". . . such obligation does not compel either party to agree to a proposal or require the making of concessions. . . ." While the parties must sincerely endeavor to work out their differences, they need not engage in fruitless marathon discussions at the expense of frank statements and support of their positions, *Wonder State Mfg. Co.*, supra at 215, and the failure to execute an agreement where it is the result of the parties inability to agree is not a violation of the good faith requirement. *N.L.R.B. v. United Clay Mines Corp.*, 219 F.2d 120 (6th Cir. 1955). Not failure to agree but sincerity of effort is the true test. *N.L.R.B. v. Arkansas Growers Coop Assn.*, 400 F.2d 565, 571 (8th Cir. 1968).

In the present case there are several factors, some of which have already been discussed, which necessitate a finding that the Company herein has failed to bargain in good faith with the representative of its employees.

Unilateral wage increases are not in and of themselves substantial evidence of bad faith. *Wonder State Mfg. Co.*, supra. However, in the present case the unilateral action was accompanied by other conduct which supports a finding of bad faith. In the first place, the Company president, Mr. Peer, admitted that he granted some of the increases in question even after he had been informed by his attorney, Mr. Tate, that such raises were illegal and subsequent to receiving the unfair labor practice charge (Tr. 258-259, Ex. B). In addition, after receiving the unfair labor charge, Mr. Peer caused the notice of April 7th (Exhibit 10) to be replaced with a new notice which informed the employees that the Company had been

charged with an unfair labor practice merely ". . . because we granted a few pay raises." (Tr. 289-290) Even after Mr. Peer found out that the notice was not a fair statement of the reason for the charge he made no attempt to explain or change the notice (Tr. 294-295).

Further, it is well established that misleading the Union into believing that an agreement has been reached and that only formal execution remains constitutes a violation of section 8(a)(5) and is evidence of bad faith. *N.L.R.B.* v. *Coletti Color Prints, Inc.*, 387 F.2d 298, 304 (2nd Cir. 1967); *N.L.R.B.* v. *Mayes Bros. Inc.*, 383 F.2d 262 (5th Cir. 1967).

In this case the Company went further than merely leading the Union down the garden path. Here they refused to sign an agreement which, as was previously discussed, had actually been reached. The agreement was not executed on April 2, 1968 when the Union had been lead to believe it would be signed. It was not signed within the "48 hour" period following the April 2 meeting as the Company negotiator had promised and no attempt was made to inform the Union of or to attempt to explain this delay. In fact, the only subsequent response to the Union's request that the Company sign the agreement was a letter from the Company negotiator some twelve days after the meeting stating that the Company would sign if the Union was willing to change the April 2 agreement by decreasing Company participation in the health insurance premium to 50% and offering inclusion of the long requested Union demand for job classification. Repudiation of agreements, even though they are merely tentative, has been held to be evidence of bad faith at least where the company has repudiated such agreements in their entirety. *San Antonio Machine & Supply Corp.* v. *N.L.R.B.*, 363 F.2d 633 (5th Cir. 1966). Here the agree-

ment as to 100% Company participation in the health insurance program was not tentative but, as has been previously discussed, was final and binding. And yet the Company sought to repudiate it. In view of these circumstances, the actions of the Company in this case must be viewed as inconsistent with a sincere desire on its part to resolve the difference between it and the Union and reach an ultimate agreement.

It is true that the Company herein had cooperated within the Union in setting the times and places of meetings and in supplying the Union with desired information. However, this, by itself, is not sufficient to fulfill its obligation to bargain in good faith. ". . . [B]ad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *N.L.R.B.* v. *Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960). Although that case was different factually from this, the statement seems equally applicable.

It is therefore the recommended conclusion of the Master that the Company did not bargain "in good faith" with the representative of the Union and in this also violated the decree of the Court of Appeals.

Based on the above specific findings of fact and law, it is the recommended conclusion of the Master that Ralph Printing & Lithographing Company has violated both the letter and intent of the decree of the Court of Appeals in that the Company bargained in bad faith, refused to execute the contract when agreement had been reached and the negotiator had the authority to do so, and granted wage increases to certain em-

[illegible]
ployees during a period when the Union was the collective bargaining agent and when contract negotiations were in progress.

Dated: October 2, 1968.

SPECIAL MASTER

APPENDIX C

No. 18,570

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

RALPH PRINTING & LITHOGRAPHING COMPANY,
Respondent.

DECREE

Before: MEHAFFY and BRIGHT, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to adjudge Ralph Printing and Lithographing Company in civil contempt for having failed and refused to comply with this Court's decree of July 6, 1967. On October 2, 1968, Honorable Robert Van Pelt, as Special Master, issued his report finding that the Company was in civil contempt of said decree. The Court heard oral argument on April 13, 1970, and issued its decision on September 25, 1970.

ON CONSIDERATION WHEREOF, it is ordered and adjudged that Ralph Printing and Lithographing Company is in civil contempt of this Court, and that said Company, its officers and agents, shall purge itself of said contempt by:

1. Notifying Lithographers and Photoengravers International Union AFL-CIO and its Local 203, Lithographers and Photoengravers International Union, AFL-CIO, (hereinafter collectively called the Union) within

15 days from the entry thereof in writing that upon request of said Union it will execute the agreement considered in April 1968 with Local 203.

2. If so requested by said Union, executing said agreement and delivering the executed copy to the Union within 5 days of the receipt of the request, and thereafter honoring it in good faith.

3. Otherwise fully complying with and obeying the said decree of the Court including but not limited to refraining from offering, promising or granting to its employees wage increases or other benefits or instituting changes in terms and conditions of employment without first affording the Union notice and reasonable opportunity to bargain thereon.

4. Reimbursing its employees for all losses of wages and benefits as may have been lost by said employees by reason of the Company's unlawful refusal to execute the aforesaid agreement, together with interest at the rate of 6% per annum. If the parties cannot agree on the amounts of such losses, if any, the amounts shall be computed by the Board as in a backpay proceeding and submitted to the Court for further review.

5. Commencing 20 days from the date hereof, posting in conspicuous places including all places where notices to employees are customarily posted for a period of 60 consecutive days, a notice, signed by the Company by an officer thereof, which states that the Company has been adjudicated in civil contempt for disobedience of the Court's decree as set forth in this order, copy of this order to be posted with said notice, and that the Company has compli[illegible] with the requirements of paragraphs 1 and 2 above, and that the Company will take the other action in purgation ordered by the Court,

and maintaining such notices and a copy of this order in clearly legible condition throughout such posting period taking reasonable precautions that they are not defaced, altered or covered by any other material.

6. Filing a sworn statement with the Director of the Seventeenth Region of the Board notifying said Director in writing within 20 days after the entry of the order showing what steps have been taken by the Company to comply with the Court's directions, and again at the end of the posting period showing that the Company has brought itself and maintains itself in compliance with the decree and this order.

7. Paying to the Board all court costs incurred in this appeal. The prayer of the Board for attorneys' fees and expenses of investigation is denied.

In order to insure compliance with the foregoing provisions, it is further ordered that upon the failure of respondent, its officers and agents to purge itself of contempt as herein provided, this court will deal further with the matter by imposing upon respondent a compliance fine of $500.00 and a further compliance fine of $100.00 per day for each day of continued noncompliance and by such other means as the court may direct, including the issuance of body attachment upon any officer or agent responsible for such noncompliance.

Dated—October 29, 1970.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1019

RALPH PRINTING & LITHOGRAPHING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in the present contempt proceeding (Pet. App. 15-24) is not yet reported. The opinion of the Special Master (Pet. App. 25-60) is not reported. The court of appeals' earlier opinion enforcing, as modified, the Board's unfair labor practice order (158 NLRB 1353) is reported at 379 F. 2d 687.

JURISDICTION

The civil contempt judgment of the court of appeals (Pet. App. 61-63) was entered on October 29, 1970.[1] The petition for a writ of certiorari was filed on November 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the finding of the Special Master that the company and union had agreed to the terms of a bargaining contract which the company then refused to execute was clearly erroneous.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

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[1] On November 6, 1970, the court of appeals denied petitioner's request for a stay of the contempt judgment pending the filing and disposition of a petition for a writ of certiorari (Pet. 1).

STATEMENT

A. The Findings of the Special Master

On July 6, 1967, the court of appeals (379 F. 2d 687) enforced the order of the National Labor Relations Board (158 NLRB 1353, 1365) requiring the Company to bargain collectively with the Lithographers and Photoengravers International Union, AFL-CIO, Local 38, and to embody any understanding reached in a written agreement. On June 16, 1968, the Board filed a petition for adjudication in civil contempt, alleging that the Company had violated the court's decree by (1) failing and refusing to negotiate in good faith with the Union; (2) granting unilateral wage increases to certain employees in the unit without first notifying or consulting with the Union; and (3) refusing to execute a written contract incorporating the terms of a final agreement with the Union, negotiated on behalf of the Company by its attorney. The court of appeals appointed District Judge Van Pelt as Special Master; on October 2, 1969, he filed his report, finding that the allegations in the contempt petition were true and recommending that the Company be adjudged in civil contempt of the court's decree. The Company here challenges only the findings respecting its refusal to execute the contract. The relevant facts relating to that issue are as follows:

Bargaining commenced on October 3, 1967, with the Union represented by International Representative Mel Galbraith, Local President Dale Bahn, and a group of Company employees; the Company was

represented throughout the negotiations by its attorney, John E. Tate (Pet. App. 26). At the October 3 meeting, the Union presented a draft document which set forth its opening proposals, reserving the right to have its International President finally approve any agreement reached (Pet. App. 27; Tr. 29-30).[2] Tate rejected the Union's proposals, and at the second bargaining session on October 18 submitted the Company's counterproposal. This document stated: "if terms agreed to in bargining sessions are subject to acceptance or rejection of Union members later then this Company officialdom reserves the same right of final acceptance or rejection of the terms entered into here by its negotiator. If the word of the Union representatives here is final then so is that of the Company negotiator" (Pet. App. 27, Ex. 4). Tate made it clear, however, that this reservation was conditional, that he was in fact authorized to enter into a contract with the Union if he so chose (Pet. App. 27-28; Tr. 43, 153, 158-159, 170, 390). Two more meetings were held, and by January 3, 1968, agreement had been reached on a number of items (Pet. App. 28; Tr. 36-39).

On March 6, 1968, the parties met for the fifth bargaining session; the Union was represented by International Vice-President Ted Brandt (Pet. App. 28). The Union presented a document entitled "Union's proposed solution for settling entire contract" (Pet. App. 28; Tr. 51, Ex. 8). It provided

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[2] "Tr." references are to the transcript of proceedings held before the Special Master; "Ex." references are to the joint exhibits stipulated by the parties before the Master.

that all terms previously agreed upon were to be incorporated in a contract; the items still in dispute were to be settled in a "package", with the Union accepting certain outstanding Company offers (such as funeral leave) and agreeing to others with minor changes, and the Company in return adopting an apprenticeship program and job classification wage scales. (Pet. App. 28-29; Ex. 8.) Brandt stated that he had authority to sign such an agreement from the Union's International President (Pet. App. 28; Tr. 176-179); however, Tate refused to agree to job classification wage scales, and, though the Union offered to drop several of its demands, the meeting ended with wage scales, vacations, and holidays still in dispute. (Pet. App. 28-29; Tr. 45-47).

Immediately after the March 6 meeting, the employees voted to drop all their remaining demands, including job classification wage scales, and accept the contract offered by the Company (Pet. App. 30; Tr. 47-48). Union representatives Bahn and Brandt obtained authority from the International Union to accept the Company's terms, and Bahn told Tate's secretary to inform Tate that the Union was ready to sign a contract (Pet. App. 30; Tr. 48-50). On March 7, Company President Joe Peer posted the following notice on the Company bulletin board: "Our attorney has advised us that in negotiations last night the Union capitulated on all remaining contract points except job classification. It looks now as though the Union will give in on that point as well, and we may have a 3 year Union contract signed in the near future" (Pet. App. 29; Tr. 272, 404, Ex. 10).

On March 12, Bahn, not having heard from Tate, wrote him a letter again stating that the Union was ready to sign a contract incorporating only those terms to which the Company had agreed. Tate replied that he had "no idea" what Bahn was talking about (Pet. App. 30; Tr. 51-52); however, on March 20, Tate agreed by telephone to draft a completed contract for signature on March 28 which would embody the agreed terms (Pet. App. 30-31; Tr. 53). In a letter requesting that the contract signing be postponed until April 2, Tate repeated his intention to "have completed in final form the contract as I understand it" (Pet. App. 31; Tr. 397, Ex. 12). On March 28, Tate wrote to Bahn to confirm his understanding that the Union had agreed to drop all its outstanding demands, including apprenticeships, job classification, "interval President approval," and any other item not already included in the contract (Pet. App. 31; Ex. 13). His secretary also sent Bahn a draft contract under cover of a letter which read: "I surely hope I understand Mr. Tate's notes correctly. He is in San Diego, but he asked me to send you a final draft for signature at the Tuesday night [April 2] meeting" (Pet. App. 31; Ex. 14, 16; Tr. 54-55, 398-401).[3]

On April 2, Tate refused to execute the contract, though it had been signed by Union Vice President Frank Culton and by Bahn, and Bahn had informed

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[3] Copies of the letter and contract were also sent to Company President Joe Peer, who not only read them both, but discussed them with Company owner Clifton Batchelder (Pet. App. 31; Tr. 283-287).

Tate that he had final authority to bind the Union. Tate stated, for the first time, that he had no authority to sign for the Company but would submit the contract to owner Clifton Batchelder, who would give the Union an answer within 48 hours (Pet. App. 31-32; Tr. 61-62, 139, 392-393).

This period closed without word from the Company. Bahn then telephoned Tate's office and left a message that Tate call him; Tate failed to do so. On April 10, Bahn spoke with Company President Joe Peer, and the two met on April 12 to discuss the contract (Pet. App. 32; Tr. 62-66, 225-227). During this discussion, Peer voiced his disapproval of the Health and Welfare clause in the contract; Bahn replied that he had no authority to make any changes in the document and urged Peer to persuade Batchelder to sign it (Pet. App. 32-33; Tr. 67-69, 226-229). On April 16, Tate sent the Union a letter seeking to reopen negotiations on both the Health and Welfare clause and the Union's earlier job classification proposal. The Union did not respond. (Pet. App. 33; Ex. 18.)

B. The Conclusions of the Special Master and the Court Below

The Special Master held (Pet. App. 55):

> * * * that an agreement had been reached, that the Union had signed and that the authorized agent of the Company refused to sign, stating instead that he would seek the approval of Mr. Batchelder (Tr. 62, 392). Further, it appears that Mr. Batchelder refused to sign the agreement and that after a delay of fourteen days the Company responded with a counter offer (Ex-

hibit 18). Finally, it should be noted that the counter offer (Exhibit 18) did not mention or allude to any of the issues which the Company claims were still in dispute as of April 2, 1968. Instead, it stated that the ". . . company is willing to finalize the agreement. . ." if the Union will accept 50% Company contribution to the Health Insurance program in exchange for the Company granting the Union's requested job classification proposal. In these circumstances it must be concluded that the Company refused to sign and in fact partially repudiated the previously reached collective bargaining agreement and thereby violated the specific requirement of the decree of the Court of Appeals ordering them to bargain collectively with the employees' representative.[4]

The court of appeals upheld the Master's findings and conclusions, stating that, "[a]lthough the evidence is in conflict * * *, the Master's findings of fact are binding upon this court unless clearly erroneous. * * * There is ample evidence to support the Master's conclusion, and we cannot therefore say that his findings are clearly erroneous" (Pet. App. 22). The court accordingly adjudged the Company in civil contempt of its earlier degree and ordered it, *inter alia*, to notify the Union that, upon its request, "it will execute the agreement concluded in April 1968" (Pet. App. 23).

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[4] The Master further concluded that (1) Attorney Tate had actual and/or apparent authority to negotiate and sign a binding contract on the Company's behalf (Pet. App. 45-48); and (2) the April 2 document which Tate refused to execute contained all the terms of a completed, final agreement between the Company and the Union (Pet. App. 49-54).

ARGUMENT

Petitioner's basic contention here is that the order of the court below conflicts with *H. K. Porter* v. *National Labor Relations Board*, 397 U.S. 99, for it requires the Company to accept substantive contract provisions which were not agreed to in collective bargaining. That issue is not presented here. The Special Master found that the Company refused to execute a contract whose terms had in fact been agreed to by both parties. See *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514. Accordingly, the only issue presented is whether the court of appeals properly concluded that there was "ample evidence" to support the Master's finding. Such an evidentiary issue does not warrant further review by this Court. In any event, the facts summarized above show that the court of appeals correctly resolved it.[5]

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[5] The Master discredited Tate's testimony (Tr. 379-380) that no final agreement had ever been reached and that, as of April 2, 1968, there were numerous points still in dispute. Union President Bahn testified (Tr. 86-97) that the items referred to by Tate, most of which related to early Company demands, were either dropped or bargained away during the course of the negotiations.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JANUARY 1971.

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